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DISCUSSION KICK-OFF

Selecting Europe's Judges: on the Evolving Legitimacy of Appointments in Luxembourg and Strasbourg

What is judicial legitimacy?

DR. BILYANA PETKOVA — 16 July, 2014



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The concept of legitimacy is a favorite debate among many political philosophers and lawyers. Since our perceptions of what is legitimate change over time, we look at legitimacy not as a static concept but as one evolving over time.

Judicial appointments, particularly to constitutional, federal and international courts have always been a sensitive matter. In Europe, the impartiality and professional merit of both domestic and supranational judges are becoming a bedrock principle of judicial legitimacy. However, although it is hard to imagine today, the first judges at the European Court of Justice's (ECJ) predecessor court were not professional lawyers and instead came from diverse professional backgrounds such as a high school teacher or an economist. Similarly, judicial independence did not always rank high on the legitimacy scale of courts. What now seems unthinkable used to be the norm: in medieval England, judges were an integral part of the king's administration, so the distinction between judicial and administrative duties was rather obscure. And certainly, whether on the bench of the European Court of Human Rights (ECtHR) in Strasbourg or elsewhere, the fact that judges were invariably old white men did not call judicial legitimacy into question.

However, times have changed. Today, two main arguments for having diversity on the bench are starting to be advanced. The first argument is that the diverse, real-life personal experiences of the judges will provide balanced perspectives to judicial decisions and substantively affect the law. The second argument is that even if the personal experiences of the judges does not—or, as some would argue, should not—affect the law in a substantive way, the presence of underrepresented groups on the bench conveys a sense of inclusiveness and procedural fairness, which encourages more members from such groups to enter the legal profession and to make use of the judicial system.

The New Vetting Panels in Luxembourg and Strasbourg

More recently, calls for improving the expertise of judges and limiting the unfettered discretion of national executives in the appointment process have resulted in the institution of expert judicial panels that vet the national nominations at both the ECJ and the ECtHR. The Lisbon reform of the EU Treaty established the so-called Article 255 Panel. Operational since 2010, the Panel is composed of seven members from former national highest court judges and constitutional judges, as well as former ECJ judges. The European Parliament nominates one of the Panel members, whereas the President of the Luxembourg Court suggests all the others; all Panel members are appointed by the European Council for a term of four years, renewable once. The Panel 255 has the task, after interviewing the candidates and deliberating in private, to deliver either a favorable or an unfavorable reasoned opinion on the suitability of both first time candidates and candidates suggested for reappointment by the Member States. So far, seven national candidates for judges at the General Court of the European Union (formerly, the First Instance Court) have received negative opinions and were later replaced by their governments. It remains to be seen whether in the future the Panel will also vet nominations for the ECJ.

The ECtHR's judicial reform that resulted in the establishment of an Advisory Panel in Strasbourg used as a blueprint and adapted both the institutional design of the Article 255 Panel and the criteria that this Panel later elaborated. According to the procedure set forth in the European Convention of Human Rights, each Contracting Party submits a shortlist of three candidates. After the Subcommittee of the Parliamentary Assembly of the Council of Europe interviews the candidates, it recommends a candidate to the Assembly's plenary committee; the

Assembly is then empowered to elect the new judge by a majority vote. In light of pressure from the Parliamentary Assembly, NGOs (such as Interrights), and former members of the ECtHR, the Committee of Ministers of the Council of Europe established an Advisory Panel that consists of seven members composed of former Strasbourg judges and various international and national highest court judges. The Strasbourg Advisory Panel has to examine the *curricula vitae* of the candidates. After deliberating in private, it advises the national governments on the suitability of their nominees before the lists are officially submitted for consideration.

From Ad-Hoc to Formalized Domestic Procedures

Although the national procedures for nominating either ECJ or ECtHR judges remain a prerogative of the Member States, the two judicial panels seem to have de facto contributed to the formalization of various national nomination procedures. After the supranational reforms, judicial panels that emulate the structure of the two supranational ones were established as a step of the nomination procedure for selecting either ECJ and/or ECtHR judges in a number of European states (Finland, the Czech Republic, Bulgaria, Belgium and Croatia). At the moment of writing, Spain and Greece remain in the minority of EU states that still have exclusively executive-dominated models of selecting European judges. This type of selection procedure is dwindling, however: even countries that do not use independent bodies to evaluate nominations of judges to the European courts have introduced reforms. Since 2013, the Italian Parliament must be apprised of the nominating procedure followed by the government; after assuming office, a judge from the ECJ or the General Court might be summoned by the parliamentary committee to attend a parliamentary hearing.

Hammering Out Legitimacy: Transparency, Accountability and Gender Balance

Evidently, far from being a paper tiger, the Article 255 Panel has had an impact on a number of national nominations and has also unofficially influenced the selection processes in some Member States, thus limiting executive arbitrariness. It remains to be seen whether the Member States will extend the mandate of the Panelists for four more years, whether the Panel will have an even larger role to play in selecting judges for the General Court in accordance with proposals to increase the number of judges at that court, and whether the Panelists will have the audacity to also veto candidates for the ECJ.

However, although the Panel 255 has had some positive effects on the selection of judges, it has also been criticized. Like its Strasbourg counterpart, the 255 Panel lacks democratic accountability and transparency, and has made use of its wide discretion in setting selection criteria. For instance, the Panel 255 requires that candidates for the General Court possess between 12 and 15 years of experience in exercising high-level duties and 20 years of experience for the ECJ. What would "high-level duties" imply? A more relaxed interpretation would mean that the successful ECJ candidate would have served at a lower court for a couple of years after having been appointed as a judge at the national supreme or constitutional court, or that the candidate's twenty years of experience begin accruing when he is an assistant professor. Alternatively, a more stringent interpretation would mean that the average candidate for the ECJ would have served as a judge on the bench of a national supreme or constitutional court and/or taught as a full professor for twenty years. The latter interpretation

would effectively mean that judges would be 60 or even 70 years old at the time of their nomination. In comparison, the current ECJ Vice-President Lenaerts was 35 years old when he joined the General Court and 49 when he joined the ECJ.

Along with the criterion of merit, gender balance on the judicial bench is gradually gaining ground as an important principle of judicial legitimacy. Following calls from the Parliamentary Assembly of the Council of Europe and a 2008 Advisory Opinion of the ECtHR, the national governments are now compelled to present at least one female candidate in their lists containing three candidate judges for the Strasbourg court. Since exceptional circumstances can waive this requirement, it is seen as a 'soft' rather than a 'hard' quota. The gender balance of the other EU institutions is regarded as part of EU institutional legitimacy, something that the European Parliament emphasized in 2013 on first reading of the Corporate Board Gender Quotas Directive that aims for 40% female representation among non-executive board directors by 2020. Parliament reasoned that: "The Union institutions, bodies and agencies and the European Central Bank should lead by example as regards gender equality in decision-making, inter alia by setting objectives for a gender-balanced representation at all levels." Gender, however, is currently not among the criteria for selection of Luxembourg judges.

Marijn van der Sluis has posted a response to this post.

Dr. Bilyana Petkova is starting her project on data protection at the Law Department of the New York University in September 2014. She holds a PhD in International Relations from the University of Kent and a Master in Law from the Yale Law School. Her book chapter titled "Spillovers in Selecting Europe's Judges: Will the Criterion of

Gender Equality make it to Luxembourg?" is forthcoming in M. Bobek (ed.), "Selecting Europe's Judges", Oxford University Press, 2015.

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